Supreme Court, U.S.
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No. 00-708

IN THE
# Supreme Court of the United States

VINCENT HENDERSON, *et al.*,
*Petitioners,*

v.

STUART O. SIMMS, *et al.*,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did Maryland prison officials violate any clearly established procedural due process rights of which a reasonable person would have known in issuing retake warrants, arresting, and reincarcerating three former prisoners after the officials determined, as a result of an intervening decision of Maryland's highest court, that the State had miscalculated the prisoners' release dates and had prematurely released them from incarceration?

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## STATEMENT OF THE CASE

This case was triggered by the State of Maryland's act of reincarcerating petitioners upon determining, on the basis of the decision of Maryland's highest appellate court in *Beshears v. Wickes*, 349 Md. 1, 706 A.2d 608 (1998), that their prior release from prison was erroneous because the State miscalculated their original release dates in light of *Wickes*. In a habeas proceeding brought by petitioner Vincent Henderson, the Maryland Court of Appeals in *Secretary, Dept. of Public Safety and Correctional Services v. Henderson*, 351 Md. 438, 718 A.2d 1150 (1998), held that the State's original release decision was correct under Maryland law, that the State's recalculation of Mr. Henderson's release date, though mistaken, was "understandable" in light of the Court's decision in *Wickes*, and that, by using overly broad language in *Wickes* from which the Court in *Henderson* retreated, "we inadvertently led the [State] to a conclusion that was both unintended and erroneous." *Id.* at 452, 453, 718 A.2d at 1157, 1158.

Despite this unusual admission by the State's highest court that its decision in *Wickes* reasonably led State correctional officials to a mistaken recalculation of many inmates' sentences, Mr. Henderson and his co-petitioners, two other former inmates, subsequently filed this suit seeking to hold three high-ranking State correctional officials (collectively "respondents" or "the State") personally liable in damages for purportedly violating, *inter alia*, petitioners' procedural due process rights under the Fourteenth Amendment. (App. 27-43.) The United States District Court for the District of Maryland (Smalkin, J.) granted the State's motion to dismiss the complaint, holding that qualified immunity barred petitioners' claims because "there could hardly be a clearer case for concluding that state officials acted 'reasonably, but mistakenly.'" (App. 23.)

Stating that respondents "were simply making a good faith effort to put into effect what the Court of Appeals later characterized as its own legally erroneous interpretation of Maryland law" (App. 23), the district court rejected

petitioners' reliance on cases such as *Morrissey v. Brewer*, 408 U.S. 471 (1972), by distinguishing "the situation in *Morrissey* (where the plaintiff was unquestionably enjoying a legitimate period of liberty between his parole release and its revocation) and the situation confronting these defendants after *Wickes* (under which plaintiffs were not entitled to release *ab initio*)." (App. 23.) The district court concluded that respondents did not violate any clearly established procedural due process rights and thus were entitled to qualified immunity, stating that, "faced with state law as it was declared to them by the highest court in Maryland at the time of the retakes, the officers certainly reasonably could have believed that the plaintiffs had no protected liberty interest that demanded pre-deprivation notice and a hearing." (App. 24.)

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's dismissal of the complaint. Agreeing with respondents that, "under Maryland law and law from other jurisdictions, prisoners erroneously released from incarceration hold the same status as escapees for purposes of their reincarceration" (App. 10), the court of appeals stated that petitioners "by their own admission" "do not challenge the reasonableness of [respondents'] misinterpretation of *Wickes*, and by implication, the reasonableness of [respondents'] belief that [petitioners] had been mistakenly released." (App. 16.) Recognizing that "[a] prisoner who is mistakenly released does not have a protected liberty interest because, unlike a parolee, he does not have a 'legitimate claim of entitlement' to freedom" (*id.*) (citations omitted), the court of appeals held that, "[w]ith no liberty interest to protect, there is no violation of due process and no need for the pre-detention hearings contemplated by *Morrissey* and its progeny." (*Id.*)

The court of appeals also held that even if such a liberty interest existed, respondents were entitled to qualified immunity because "this right was not clearly established at the time of [petitioners'] arrests." (App. 17.) The court

observed that although it had previously "recognized that the due process requirements of *Morrissey* applied to revocations of pardons and revocations of supervised release" (*id.*), "the liberty interest of a mistakenly released prisoner differs greatly from the liberty interest of a prisoner who has been pardoned or a prisoner who is on supervised release . . . ." (*Id.*) Stating that "it does not automatically follow that a mistakenly released prisoner is entitled to a hearing to challenge his arrest and reincarceration" (*id.*), the court held that petitioners' "Fourteenth Amendment rights in this particular context, even if recognized, were not sufficiently clear at the time of their arrests to notify reasonable state officials in [respondents'] position that their denial of a hearing to [petitioners] was unlawful." (*Id.*)

## REASONS FOR DENYING THE WRIT

The unique facts of this case make it extremely unlikely that the court of appeals' decision will have any effect beyond this litigation. Indeed, other than the courts below, no court has even addressed, much less decided, the precise issues presented here. Further review of this case will result in little, if any, guidance in other cases and is thus unwarranted because the decision of the court of appeals rests on an unusual fact-based determination.

That determination also gives rise to no error that could conceivably justify the exercise of this Court's discretionary jurisdiction. The court of appeals found that an erroneously released prisoner may be summarily retaken into custody under longstanding Maryland precedent, that petitioners have never challenged "the reasonableness of [respondents'] belief that [petitioners] were released 'through some illegal or void order'" (App. 11), and that respondents "reasonably thought that [petitioners] were mistakenly released prisoners with no cognizable interest in remaining at liberty." (App. 3.) The court of appeals decided no novel or unsettled questions of federal law but rather applied well-established legal principles in concluding that respondents

violated no clearly established due process rights in reincarcerating petitioners on the basis of this belief.

## THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

In evaluating a claim of qualified immunity, "a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 119 S.Ct. 1692, 1697 (1999) (quoting *Conn v. Gabbert*, 119 S.Ct. 1292, 1295 (1999)). *See also Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991). Petitioners' claims are barred by qualified immunity for the principal reason that petitioners have failed to demonstrate that the conduct resulting in their reincarceration caused any constitutional violation.

Petitioners' due process claim is based on a narrow view of qualified immunity that this Court has rejected and need not revisit. Rather than embrace their restrictive approach to qualified immunity that any purported violation of the Constitution is "clearly established," the Court has held that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 119 S.Ct. at 1700 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Instead of discussing cases at the appropriate level of specificity, however, petitioners rely exclusively on general Fourteenth Amendment principles announced in cases such as *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), in which an individual's release had been revoked due to violations committed while on parole. Those decisions do not involve conduct remotely similar to that at issue here and are inapplicable in cases involving the incarceration of individuals reasonably believed to have been erroneously released from prison.

While petitioners claim that their status as escapees is

irrelevant, Pet. at 5, that status is critical because, as the Maryland Court of Appeals recognized over seventy years ago, "[t]he decided weight of authority, and, in our opinion, the better reasoned cases, hold that, where a prisoner secures his liberty through some illegal or void order, it is to be treated as an escape, and he can be retaken and compelled to serve out his sentence . . . ." *Hopkins v. North*, 151 Md. 553, 556, 135 A. 367, 368 (1926). The same conclusion has been reached in other jurisdictions. "A void parole has no effect on the original judgment; and, where the sentence is lawful, a prisoner at large on an illegal and void parole is on the same plane as an escapee. Accordingly, no rights of the prisoner are violated under a purported parole, which is invalid, when he is returned to prison." *Jefferson v. Morris*, 548 N.E.2d 296, 298 (Ohio App.1988) (quoting 67A Corpus Juris Secundum, Pardon & Parole, § 57, at 95 (1978)). *See also Fredericks v. Gladden*, 315 P.2d 1010, 1016 (Ore.1957) ("If at a time when the defendant was illegally at large he was apprehended and returned to the penitentiary, his term not having then expired, we need not inquire how he got there.") (citing *Hopkins v. North* and other cases).

In light of these cases, there is nothing exceptional about the court of appeals' holding that the State did not act unlawfully in reincarcerating petitioners on the basis of recalculation decisions – whose reasonableness the Maryland Court of Appeals explicitly recognized in *Henderson* – which demonstrated that each petitioner's "release was invalid, and that the [State's] action in releasing him, though done in good faith, was unauthorized and illegal . . . ." *Hopkins v. North*, 151 Md. at 557, 135 A. at 368. Rather, the State's conduct was in full accord with the settled proposition that "under common law a convicted person erroneously at liberty must, when the error is discovered, serve the full sentence imposed." *United States v. Martinez*, 837 F.2d 861, 864 (9th Cir.1988). *See also Green v. Christiansen*, 732 F.2d 1397, 1399 (9th Cir.1984) ("The prison authorities had the power to recommit Green

after he had been released by mistake so long as his sentence would not have expired had he remained in confinement."); *Davis v. State*, 723 S.W.2d 366, 367 (Ark. 1987) (finding irrelevant "the lapse of time on the sentence where a defendant has been released under a void order prior to the completion of her sentence").

The court of appeals' decision is also consistent with other cases in which courts have rejected constitutional challenges to the arrest and reincarceration of individuals mistakenly released from prison. In *Campbell v. Williamson*, 783 F.Supp. 1161 (C.D.Ill. 1992), for example, the court found that an individual who had been mistakenly released from prison had "no cognizable liberty interest in remaining free" because the State continued to have "legal custody due to the Plaintiff's unfinished sentence," *id.*, and so there was "no cognizable constitutional violation in the Plaintiff's detention and return to state custody." *Id.* at 1163. *See also United States v. Polito*, 583 F.2d 48, 55 (2nd Cir.1978) ("[I]t cannot be said that the retaking of a prisoner who is already within the legal custody of the authorities constitutes an arrest within the meaning of the constitutional provisions.") (quoting *Story v. Rives*, 97 F.2d 182, 188 (D.C. Cir.), *cert. denied*, 305 U.S. 595 (1938)).

Similarly, in *McKellar v. Arizona State Dept. of Corrections*, 566 P.2d 1337 (Ariz.1977), the court upheld the summary arrest and reincarceration of an individual who was taken back into custody when the State determined, almost three months after releasing him on parole, that it had incorrectly computed his parole eligibility date. Stating that "[a]s soon as its mistake was realized, the state reasserted custody of appellant" and that "it clearly never lost jurisdiction," *id.* at 1339, the court rejected the prisoner's argument that he was "entitled to minimal due process before he's taken back into custody," *id.*, and held instead that it could "find no authority which would allow us to order disobedience to the mandatory provisions of" Arizona law requiring the prisoner's completion of his sentence. *Id. See also Jefferson v. Morris*, 548 N.E.2d at

298 (no constitutional violation in reincarcerating a prisoner when he "was not eligible for parole and the Adult Parole Authority was without authority to parole appellant since by his own admission appellant had served only about five years of his life sentence"); *State v. Bandics*, 805 P.2d 66, 68 (Nev. 1991) (reversing as "clearly erroneous and not supported by substantial evidence" the trial court's findings that the arrest and reincarceration of a prisoner whose detainer had been erroneously released constituted "waiver, equitable estoppel and [a] violation of due process").

By ignoring this more specific authority and invoking broad principles announced in factually inapposite cases that have no application here, petitioners have improperly defined the right at issue too abstractly and thus converted the defense of qualified immunity "into a rule of unqualified liability." *Anderson v. Creighton*, 483 U.S. at 639. While "general statements of the law are not inherently incapable of giving fair and clear warning," *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997), such statements, or broadly analogous case law, must apply with "obvious clarity to the specific conduct in question" in order to constitute "fair warning." *Id.* Respondents' actions are supported by specifically analogous case law that confirms the propriety of their conduct, which is not even covered, much less proscribed, by the general principles that petitioners invoke. The court of appeals in this case thus decided nothing legally remarkable in concluding that procedural due process is not violated by the State's efforts to safeguard the public's safety and welfare by returning to custody convicted felons determined to have been erroneously released from prison.

In addition to relying on factually inapposite cases, petitioners also seek support for their claim in the State's purported "total failure to afford the petitioners a hearing to challenge the revocation of their release status . . . ." Pet. at 9. As other courts have recognized, the summary arrest and reincarceration of an escaped prisoner does not violate any due process rights because, "first, the convict has

already received all the process he is due concerning his conviction and sentence; second, the danger of erroneous deprivation – for example, in a case of mistaken identity or a legitimate dispute concerning the fact of escape – is alleviated by the availability of habeas corpus relief." *Tavarez v. U.S. Attorney General*, 668 F.2d 805, 810 (5th Cir.1982) (footnotes and citation omitted). These considerations, which are equally applicable in cases such as this when prison authorities determine that a prisoner has been erroneously released and thus may "be treated as an escape," *Hopkins v. North*, 151 Md. at 556, 135 A. at 368, confirm that petitioners have not been unlawfully denied due process of law.

Maryland's habeas corpus statute provides that "[a] person committed, detained, confined, or restrained from his lawful liberty within the State . . . under any color or pretense . . . may petition for the writ of habeas corpus . . . ." Md. Cts. & Jud. Proc. Code Ann. § 3-702(a) (1998 Repl. Vol.). A petition for a writ of habeas corpus shall be referred to a judge who "shall immediately inquire into the legality and propriety of the confinement or detention," *id.*, 3-704(a), and "shall release or discharge the person immediately" upon a showing "that the person is detained without legal warrant or authority . . . ." *Id.*, § 3-704(b).

As petitioners' complaint makes clear, habeas relief was not only available in this case, but it resulted in their release within approximately two weeks of their incarceration. (App. 37-39 ¶¶ 29-33.) Thus, petitioners acknowledge that habeas corpus relief was available to them from the outset of their reincarceration *and* that all of them were released from incarceration as a result of the habeas proceedings. *See also* Pet. at 3-4. Petitioners are fundamentally mistaken, therefore, that the State never provided any hearing "of any sort, at any time." *Id.* at 9. The timing of petitioners' release from incarceration not only falls well within the time frame of the initial hearing that *Morrissey* stated should be held "promptly . . . after arrest," 408 U.S.

at 485, but is also consistent with the observation in *Morrissey* that "[a] lapse of two months" between the time the individual is taken into custody and the final hearing "would not appear to be unreasonable." *Id.* at 488. *See also Pierre v. Washington State Board of Prison Terms and Paroles*, 699 F.2d 471, 473 (9th Cir.1983) ("Since the on-site hearing was conducted only 21 days after appellant's parole was suspended, it was prompt enough to qualify as the preliminary probable cause determination required by *Morrissey*."); *State v. Myers*, 545 P.2d 538, 544 (Wash. 1976) ("Appellant first argues that the failure to conduct a 'preliminary hearing' was a denial of due process. This argument is without merit because in this case the final revocation hearing itself was held within 30 days after the arrest warrant was issued.").

The habeas remedy made available to petitioners establishes that, even under their view of the Fourteenth Amendment, their constitutional rights were not violated because they were provided a timely opportunity to challenge "the legality and propriety of the confinement or detention." Md. Cts. & Jud. Proc. Code Ann. § 3-704(a). That hearing opportunity is not rendered unconstitutional merely because petitioner Henderson filed his habeas petition almost immediately after his reincarceration and before the State was able to offer administrative hearings to him and the other former prisoners who were taken back into custody. All that due process requires is an opportunity to be heard at a meaningful time, *see, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), which petitioners unquestionably received.

While many cases support the governmental conduct at issue in this case, petitioners have failed to cite any case that holds that the act of arresting and reincarcerating convicted felons who were determined to have been mistakenly released from prison violates the rights that petitioners assert in this case. The most that they have established is that the State's recalculation of their release dates and its corresponding decision to reincarcerate them were, in

hindsight, erroneous. Even if that conduct could be characterized as negligent – and the Maryland Court of Appeals' decision in *Henderson* demonstrates it was not – it would not violate the Constitution because "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1718 (1998). Review of this case is thus unwarranted because petitioners have failed to "establish the violation of any constitutional right at all." *Siegert v. Gilley*, 500 U.S. at 233.

Certiorari is also inappropriate because the petition does not seek review of the additional and independent reason that the court of appeals provided in holding that respondents are also entitled to qualified immunity because no clearly established due process right existed to place them on notice that their actions were unlawful. (App. 16-17.) A government official cannot be held liable for damages by engaging in conduct that does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Even if respondents were incorrect to reincarcerate convicted felons upon determining that they were released from prison mistakenly, respondents "nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

In the absence of any contrary case law that addresses the conduct at issue here, it would be anomalous to hold law enforcement officials to a higher standard of constitutional clairvoyance than judges and to subject them to personal liability for running afoul of constitutional principles that no court has ever announced in a case involving facts such as this one. Government officials "cannot have been 'expected to predict the future course of constitutional law,'" *Wilson v. Layne*, 119 S.Ct. at 1701 (quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)), when, as in this case, the plaintiffs have failed to bring to the Court's "attention any cases of controlling authority in their jurisdiction at the time

of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 119 S.Ct. at 1700.

Given the existence of cases that directly support respondents' actions, it would be even more "unfair to expect officials to anticipate changes in the law with a prescience that escapes even the most able scholars, lawyers, and judges." *Anderson v. Creighton*, 483 U.S. at 639 n.2. Petitioners underscore that unfairness in this case by failing to identify any factually-apposite decision that supports them. Absent such a decision, this case presents no issue on which the federal and state appellate courts require this Court's guidance.

## CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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